U.S. Department of Justice

Immigration and Naturalization Service

OFFICE OF ADMINISTRATIVE APPEALS
425 Eye Street N.W.
ULLB, 3rd Floor
Washington, D.C. 20536

[redacted]

Public Copy

File: EAC 98 271 50311 Office: Vermont Service Center Date:

JAN 11 2000

IN RE: Petitioner:
Beneficiary: [redacted]

PETITION: Petition for a Nonimmigrant Worker Pursuant to Section 101(a)(15)(H)(i)(b) of the Immigration and Nationality Act, 8 U.S.C. 1101(a)(15)(H)(i)(b)

IN BEHALF OF PETITIONER: [redacted]

Identifying ... prevent clearly unwarranted invasion of personal privacy

INSTRUCTIONS:
This is the decision in your case. All documents have been returned to the office which originally decided your case. Any further inquiry must be made to that office.

If you believe the law was inappropriately applied or the analysis used in reaching the decision was inconsistent with the information provided or with precedent decisions, you may file a motion to reconsider. Such a motion must state the reasons for reconsideration and be supported by any pertinent precedent decisions. Any motion to reconsider must be filed within 30 days of the decision that the motion seeks to reconsider, as required under 8 C.F.R. 103.5(a)(1)(i).

If you have new or additional information which you wish to have considered, you may file a motion to reopen. Such a motion must state the new facts to be proved at the reopened proceeding and be supported by affidavits or other documentary evidence. Any motion to reopen must be filed within 30 days of the decision that the motion seeks to reopen, except that failure to file before this period expires may be excused in the discretion of the Service where it is demonstrated that the delay was reasonable and beyond the control of the applicant or petitioner. Id.

Any motion must be filed with the office which originally decided your case along with a fee of $110 as required under 8 C.F.R. 103.7.

FOR THE ASSOCIATE COMMISSIONER,
EXAMINATIONS

Terrance M. O'Reilly, Director
Administrative Appeals Office

DISCUSSION: The nonimmigrant visa petition was denied by the director of the Vermont Service Center. The matter is now before the Associate Commissioner on appeal. The appeal will be dismissed.

The petitioner, a communications solution and software engineering firm, seeks to employ the beneficiary for three years as a programmer analyst in the H-1B classification for specialty occupations. The director determined that the petitioner did not demonstrate that it was a viable business making a realistic and valid job offer as an established importing employer and denied the petition. The petitioner appealed and asserted that additional documents overcame the reasons for denial.

In § 101(a)(15)(H)(i)(b) of the Immigration and Nationality Act (the Act), 8 U.S.C. 1101(a)(15)(H)(i)(b) pertinent provisions accord nonimmigrant classification to qualified aliens who are coming temporarily to the United States to perform services in a specialty occupation. Regulations in 8 C.F.R. 214.2(h)(4)(ii) further define the term "specialty occupation.

Provisions of § 214(c) of the Act, 8 U.S.C. 1184(c), dictate,

> The question of importing an alien as a nonimmigrant under section 101(a)(15)(H) ... shall be determined by the Attorney General ... upon petition of the importing employer....

The denial applied the definition in 8 C.F.R. 214.2(h)(4)(ii),

> *United States employer* means a person, firm, corporation, contractor, or other association, or organization in the United States which:
>
> *(1)* Engages a person to work within the United States;
>
> *(2)* Has an employer-employee relationship with respect to employees under this part, as indicated by the fact that it may hire, pay, fire, supervise, or otherwise control the work of any such employee;
>
> *(3)* Has an Internal Revenue Service Tax identification number.

Evidence which must accompany the petition includes a copy of the contract or a summary of the terms of the oral agreement under which the petitioner will employ the beneficiary. 8 C.F.R. 214.2(h)(4)(iv)(B). This record had neither.

The petitioner only surmised,

> [The petitioner] wishes to seek H-1B status for [the beneficiary] by employing his as Program Analysts [sic] to work for us in [redacted] He shall be involved in system design, performance and reliability for cellular systems. He may have to write codes (programs) and also develop algorithms to define microcells and picocells and their interworking. He may also be involved in the traffic analysis of such a system in order to determine the call handling of such systems. He may have to write programs for testing of Cellular Base Stations to determine their communication with the Mobile Switching Center (MSC).

The petitioner's offer of proof concerned prospects only committing the beneficiary to no duties. The beneficiary, in any case, gave no assent to terms in order to constitute a contract or an oral agreement. 8 C.F.R. 214.2(h)(4)(iv)(B).

The "Contract for Purchase of Services," (contract) stated only terms between the petitioner and a third party. It, in fact, consigned the supervision, evaluation, and dismissal of the beneficiary to a fourth party. It made no contract or agreement between the petitioner and the beneficiary.

The appeal brief speculated ambiguously, without any assent of the beneficiary,

> ... [The petitioner] retains final authority in the evaluations of [the beneficiary]. However, input is actively solicited from all applicable clients. We regret if previously submitted information was erroneous in that matter.

The denial correctly determined that the petitioner failed to establish the employer-employee relationship with the beneficiary. The appeal brief still accounted for no contract or agreement between the petitioner and the beneficiary.

The denial concluded, also, that the petitioner, as the importing employer under the statute, did not evidence sufficient resources to engage the beneficiary to work in the United States and to hire and pay him. 8 C.F.R. 214.2(h)(4)(ii) *(1)* and *(2)*. The appeal brief stated that the petitioner's tax returns for 1996, 1997, and 1998 (returns) provided additional evidence of its viability. The returns all showed a loss. At best, they acknowledged a 1998 gross income of $221,000 annually and did not support $500,000.00, as the petition stated. The petitioner failed to prove its capacity as an importing employer. See § 214(c) of the Act, 8 U.S.C. 1184(c).

The burden of proof in these proceedings rests solely with the petitioner. Section 291 of the Act, 8 U.S.C. 1361. The petitioner has not sustained that burden.

ORDER: The appeal is dismissed.